

No. 15605

United States
Court of Appeals
for the Ninth Circuit

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

vs.

UNITED STATES OF AMERICA.

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

AUG 27 1957

PAUL M. HARRIS, CLERK

No. 15605

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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CARL E. DAVIDSON,
CHARLES P. DUFFY,
1525 Yeon Building,
Portland 4, Oregon,
For Appellants.

C. E. LUCKEY,
United States Attorney;

EDWARD J. GEORGEFF,
Assistant United States Attorney,
United States Courthouse,
Portland, Oregon;

CHARLES K. RICE,
Assistant U. S. Attorney General;

JOHN N. STOLL,
Attorney, Dept. of Justice,
Washington 25, D. C.,
For Appellee.

In the United States District Court
for the District of Oregon

Civil No. 8282—105-32

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of LOUIS
C. SCHARPF,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

PRETRIAL ORDER

This cause came on regularly for a pretrial conference before the Honorable Gus J. Solomon, one of the judges of the above-entitled court, at Portland, Oregon, on the 13th day of February, 1956, plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, and defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney.

Admitted Facts

It appears from the pleadings and the pretrial proceedings that the following facts are admitted and may be taken and deemed by the Court, on the trial of this action, as established facts therein:

I.

This is an action for the recovery of individual income taxes for the year 1944 assessed against

Louis C. Scharpf and collected from him by a former Collector of Internal Revenue for the District of Oregon. Jurisdiction of this action exists by virtue of Section 1346(a)(1) of Title 28 of the United States Code, as amended.

II.

During the year 1944 Louis C. Scharpf and Eva M. Scharpf were husband and wife, residing in the City of Eugene, County of Lane, State of Oregon. Louis C. Scharpf died on May 10, 1952, and, thereafter, George L. Scharpf and William Fred Scharpf, plaintiffs herein, were duly appointed by the Circuit Court of Lane County, Oregon, as the executors of his estate, and they are still acting in that capacity.

III.

On or about January 25, 1941, Louis C. Scharpf and his wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting, under the name of Twin Oaks Builders Supply Co., a general building supply business in the City of Eugene, Oregon. During the year 1944 the business of Twin Oaks Builders Supply Co. was carried on in accordance with the terms of the partnership agreement, and Louis C. Scharpf and Eva M. Scharpf duly reported their respective incomes therefrom and paid their individual income taxes thereon to the then Collector of Internal Revenue for the District of Oregon.

IV.

Under date of October 3, 1947, the Commissioner of Internal Revenue of the United States, through the Internal Revenue Agent in Charge of the Seattle Division of the Bureau of Internal Revenue, notified Louis C. Scharpf of an income tax deficiency asserted against him for the year 1944 in the amount of \$8,328.06, based upon the assertion that one-half of the income from Twin Oaks Builders Supply Co., during the year 1944 was taxable to Louis C. Scharpf and none to his wife, Eva M. Scharpf.

On the same date, namely October 3, 1947, the Commissioner of Internal Revenue of the United States, through the Internal Revenue Agent in charge of the Seattle Division of the Bureau of Internal Revenue, notified Twin Oaks Company (a corporation owned and controlled by the partners of Twin Oaks Builders Supply Co.) of deficiencies asserted against it for the years 1942, 1943 and 1944 based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Co. for each of the years in question was taxable to said corporation rather than to the partners.

On December 24, 1947, Twin Oaks Company duly filed a petition to The Tax Court of the United States, Docket No. 16845, seeking a redetermination of the said deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner of Internal Revenue and the trial of said cause took place on June 7 and June 8, 1948.

V.

Pursuant to notice and demand, dated February 26, 1948, Louis C. Scharpf paid to the then Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, the sum of \$9,792.31, representing the said asserted deficiency of \$8,328.06 plus interest thereon in the amount of \$1,464.25. The said payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of a total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948 (Exhibit 11). Thereafter, on March 13, 1948, Louis C. Scharpf duly filed with the then Collector of Internal Revenue of the United States for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The statement incorporated in said claim for refund was as follows:

“In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and

it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final determination had as to the taxation of the income of this taxpayer.”

VI.

The decision of The Tax Court of the United States in the case of Twin Oaks Company vs. Commissioner, referred to in said refund claim, was filed on July 18, 1949, in favor of the Commissioner of Internal Revenue. Thereafter, Twin Oaks Company appealed said decision and, under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued its opinion in said case (Twin Oaks Company vs. Commissioner of Internal Revenue, 183 F.2d 385) reversing the decision of The Tax Court, finding that The Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation.

VII.

On February 16, 1951, Louis C. Scharpf filed a claim for refund in the amount of \$4,138.70 for the year 1944. The said refund claim purported to be an amendment of the refund claim filed by Louis C. Scharpf for the same year on or about March 12, 1948. The statement attached to said refund claim was as follows:

“On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a

written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the City of Eugene, Oregon. Each of the parties contributed \$2,000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

“In entering into the said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

“The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

“This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the

distributive income of Eva M. Scharpf from the said partnership was taxable to me, less over-assessment determined to be due on such ground to Eva M. Scharpf.”

VIII.

Under date of October 15, 1954, plaintiffs, as executors of the estate of Louis C. Scharpf, deceased, received from the District Director of Internal Revenue, in Portland, Oregon, “notice of adjustment” of the income tax liability of Louis C. Scharpf for the year 1944, in which it was determined and agreed that there was an overassessment or overpayment of the income tax of Louis C. Scharpf for the year 1944, in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director of Internal Revenue in Portland, Oregon, allowed a refund to plaintiffs of only \$122.55, being the amount of income tax and interest paid by Louis C. Scharpf for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, together with interest thereon in the amount of \$40.25, was refunded to plaintiffs on or about October 18, 1954.

IX.

The original claim for refund filed by Louis C. Scharpf had not been rejected prior to the filing of his amended refund claim but, under date of October 19, 1954, plaintiffs received statutory notices of the disallowance of both the original and amended

refund claims filed by Louis C. Scharpf for the year 1944.

X.

Defendant agrees that if the Court finds a compliance by Louis C. Scharpf with the statutes and regulations relating to the filing of refund claims, then plaintiffs are entitled to a refund in the amount of \$4,006.20, less the \$122.55 heretofore refunded to them, together with interest thereon as provided by law.

Plaintiffs' Contentions

I.

The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 12), was filed within two years of the date of payment (March 8, 1948) of the tax, the recovery of which is sought in this action. At that time the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

II.

The refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 13), was a proper and timely amendment of his earlier refund claim as it was filed prior to the formal disallowance of said refund claim.

III.

The various exhibits introduced in The Tax Court trial of the case of Twin Oaks Company vs. Com-

missioner evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

IV.

The statements contained in the letter of March 6, 1948 (Plaintiffs' Exhibit 11), constituted an informal refund claim.

V.

In the alternative, plaintiffs contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.

Defendant's Contentions

I.

The claim for refund filed on March 13, 1948, did not apprise the Commissioner of Internal Revenue of the grounds for refund asserted in this action and was not a timely claim for refund within the provisions of Section 322 of the Internal Revenue Code of 1939.

II.

The refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Plaintiffs' Exhibit 13), was not a proper and timely amendment of his earlier refund claim.

III.

The various exhibits introduced in The Tax Court trial of the case of Twin Oaks Company vs. Commissioner do not evidence the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents do not constitute amendments of and supplements to the original refund claim.

IV.

Defendant contends that the actions of the Commissioner of Internal Revenue did not constitute a waiver of his regulations as to the required form of a refund claim.

Issues to Be Determined

I.

Whether or not the original refund claim filed by Louis C. Scharpf for the year 1944, was amended by the various documents filed prior to the expiration of two years from the date on which the tax was paid.

II.

Whether or not the original refund claim filed by Louis C. Scharpf for the year 1944, could be amended after the expiration of two years from the date on which the tax was paid, but prior to the formal disallowance thereof by the Commissioner of Internal Revenue on October 19, 1954.

III.

Whether or not Louis C. Scharpf filed a proper and timely claim for refund for the year 1944.

IV.

If the Court determines that Louis C. Scharpf did not comply with the regulations of the Commissioner of Internal Revenue relating to the form and contents of refund claims, whether or not the Commissioner of Internal Revenue waived such regulations.

It is agreed by the parties that this pretrial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice.

The Court, finding that the foregoing clearly and accurately reflects the pretrial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said pretrial order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Dated this 14th day of February, 1956.

/s/ GUS P. SOLOMON,
District Judge.

Approved:

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

/s/ EDWARD J. GEORGEFF,
Of Attorneys for Defendant.

Lodged February 13, 1956.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been submitted on a pretrial order, exhibits and briefs of the parties; plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys; defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney; and this Court being fully advised in the premises and having rendered an Opinion dated December 14, 1956, makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is an action for the recovery of individual income taxes for the year 1944, assessed against Louis C. Scharpf and collected from him by a former Collector of Internal Revenue for the Dis-

trict of Oregon. Jurisdiction of this action is based on Section 1346(a)(1), Title 28 of the United States Code, as amended.

2. During the year 1944, Louis C. Scharpf and Eva M. Scharpf were husband and wife, residing in the city of Eugene, County of Lane, State of Oregon. Louis C. Scharpf died on May 10, 1952, and thereafter George L. Scharpf and William Fred Scharpf, plaintiffs herein, were duly appointed by the Circuit Court of Lane County as the executors of his estate, and they are still acting in that capacity.

3. On or about January 25, 1941, Louis C. Scharpf and his wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement effective January 1, 1941, for the purpose of conducting under the name of Twin Oaks Builders Supply Co., a general building supply business in the City of Eugene, Oregon. During the year 1944, the business of Twin Oaks Builders Supply Co. was carried on in accordance with the terms of the partnership agreement, and Louis C. Scharpf and Eva M. Scharpf duly reported their respective incomes therefrom and paid their individual income tax thereon to the then Collector of Internal Revenue for the District of Oregon.

4. Under date of October 3, 1947, the Commissioner of Internal Revenue notified Louis C. Scharpf of an income tax deficiency asserted against him for the year 1944, in the amount of \$8,328.06.

based upon the assertion that one-half of the income from Twin Oaks Builders Supply Co., during the year 1944, was taxable to him and none to his wife, Eva M. Scharpf. On the same date the Commissioner of Internal Revenue notified Twin Oaks Company (a corporation owned and controlled by the partners of Twin Oaks Builders Supply Co.), of deficiencies asserted against it for the years 1942, 1943 and 1944, based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Co. for each of the years in question was taxable to said corporation rather than to the partners. On December 24, 1947, Twin Oaks Company duly filed a petition to the Tax Court of the United States, Docket No. 16845, seeking a redetermination of the said deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner of Internal Revenue and the trial of said cause took place on June 7 and June 8, 1948.

5. Pursuant to notice and demand, dated February 26, 1948, Louis C. Scharpf paid to the then Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, the sum of \$9,792.31, representing the said asserted deficiency of \$8,328.06, plus interest thereon in the amount of \$1,464.25. The said payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of a total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948, which stated in part:

The payment of the deficiency above described and the application of the credit as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

Thereafter, on March 13, 1948, Louis C. Scharpf duly filed with the then Collector of Internal Revenue for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The reason set forth by him for the allowance of the claim was that:

In a proceeding now pending before the Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944, was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final de-

termination had as to the taxation of the income of this taxpayer.

6. The decision of The Tax Court of the United States in the case of Twin Oaks Co. vs. Commissioner, referred to in the claim for refund, was filed on July 18, 1949, in favor of the Commissioner of Internal Revenue. Thereafter, Twin Oaks Company appealed the decision and under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued its opinion in said case (Twin Oaks Co. vs. Commissioner, 183 F. 2d 385), reversing the decision of The Tax Court, finding that The Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation.

7. On February 16, 1951, Louis C. Scharpf filed a claim for refund in the amount of \$4,138.70 for the year 1944, which purported to be an amendment of the refund claim filed on March 13, 1948. The statement attached to said refund claim was as follows:

On or about January 25, 1941, I and my wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation,

in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300 per year each. The losses of the said business were to be divided equally among the partners.

In entering into said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects and was entitled to recognition for Federal income tax purposes.

This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less over-assessment determined to be due on such ground to Eva M. Scharpf.

8. Under date of October 15, 1954, plaintiffs as executors of the estate of Louis C. Scharpf, received from the District Director of Internal Revenue, in Portland, Oregon, "Notice of Adjustment" of the income tax liability of Louis C. Scharpf for

the year 1944, in which it was determined and agreed that there was an overassessment or overpayment of the income tax of Louis C. Scharpf for the year 1944, in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director of Internal Revenue in Portland, Oregon, allowed a refund to plaintiffs of only \$122.55, being the amount of the income tax and interest paid by Louis C. Scharpf for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, together with interest thereon in the amount of \$40.25, was refunded to plaintiffs on or about October 18, 1954. This action was based upon the Commissioner's determination (1) that the refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of Internal Revenue of the exact basis therefor, and (2) the refund claim filed on February 16, 1951, although apprising the Commissioner of Internal Revenue of the exact basis therefore, was not timely and could not be considered as an amendment of the first refund claim. Plaintiffs received statutory notices of disallowance of both the original and the amended refund claims on October 19, 1954.

Conclusions of Law

1. The claim for refund filed on March 13, 1948, by Louis C. Scharpf for the year 1944, was not a proper claim for refund inasmuch as it did not set forth the grounds or basis of this proceeding as required by Sections 322 and 3772 of the Internal Revenue Code of 1939.

2. The claim for refund filed on February 16, 1951, by Louis C. Scharpf for the year 1944, was not a timely and proper claim for refund as required by Sections 322 and 3772 of the Internal Revenue Code of 1939, nor was it a timely or proper amendment of his earlier claim for refund.

3. The Commissioner of Internal Revenue waived none of his requirements in respect to the form or content of the claims for refund.

4. The action of the Commissioner of Internal Revenue in disallowing the claims for refund was proper.

5. The defendant is entitled to judgment and costs.

April 4, 1957.

/s/ GUS P. SOLOMON,
United States District Judge.

Approved as to form only:

/s/ CHARLES P. DUFFY,
Attorney for Plaintiffs.

/s/ EDWARD J. GEORGEFF,
Attorney for Defendant.

[Endorsed]: Filed April 4, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8282

GEORGE L. SCHARPF AND WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This case having been submitted on an agreed Statement of Facts and exhibits contained in the pretrial order, and the court having rendered his opinion and having entered findings of fact and conclusions of law, now therefore in accordance therewith,

It Is Ordered that the plaintiffs' action be dismissed and that defendant have judgment for its costs.

Dated at Portland, Oregon, this 4th day of April, 1957.

/s/ GUS P. SOLOMON,

United States District Judge.

[Endorsed]: Filed April 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, defendant, and
to C. E. Luckey, United States Attorney for the
District of Oregon, and Edward J. Georgeff,
Assistant United States Attorney for the Dis-
trict of Oregon, U. S. Courthouse Building,
Portland, Oregon, its attorneys.

Notice is hereby given that George L. Scharpf
and William Fred Scharpf, Executors of the Estate
of Louis C. Scharpf, plaintiffs above named, hereby
appeal to The United States Court of Appeals for
the Ninth Circuit from the final judgment entered
in this action on the 4th day of April, 1957, in favor
of defendant and against plaintiffs.

Dated this 31st day of May, 1957.

/s/ CHARLES P. DUFFY,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed May 31, 1957.

APPELLANTS' EXHIBIT No. 7

Louis C. Scharpf
669 High Street
Eugene, Oregon

September 25, 1946.

Internal Revenue Agent in Charge
Seattle 1, Washington

Protest against the proposed determination of a deficiency of Federal Income Tax for the calendar year 1944, in the amount of \$8,124.67, as per Internal Revenue Agent's Report dated August 12, 1946, the entire amount being in dispute.

Dear Sir:

Protest is made against the proposed determination of a deficiency for the calendar year 1944, as described above.

The adjustment of income and the deficiency concerned in this protest are analyzed as follows:

	Per Agent's Report	As Corrected	Difference
Net income as per return filed	\$19,200.55	\$19,200.55	
Adjustments thereto:			
(a) Partnership	13,050.67		\$13,050.67
	<hr/>	<hr/>	<hr/>
Net income as adjusted	\$32,251.22	\$19,200.55	\$13,050.67
	<hr/>	<hr/>	<hr/>
Income tax thereon	\$15,256.11	\$ 7,131.44	\$ 8,124.67
	<hr/>	<hr/>	<hr/>

(a) The proposed adjustment made by the examining Agent to the taxpayer's net income for the

calendar year 1944 is the result of a proposed adjustment made to the taxpayer's distributive share of net income from Twin Oaks Builders Supply Co., a partnership, and as set out in Agent's Report on that Company under date of August 12, 1946. The examining Agent has transferred \$13,050.67 of the distributive share of partnership income of taxpayer's wife, Eva M. Scharpf, to the return of the taxpayer.

The taxpayer does not agree to the proposed adjustment for the reasons set out in protest of Twin Oaks Builders Supply Co., for the calendar year 1942, the statements contained therein not being repeated here, in the interest of brevity, but nevertheless being referred to and made a part of this protest.

The taxpayer's wife, Eva M. Scharpf, was a partner in Twin Oaks Builders Supply Co. during the calendar year 1944, and entitled to her distributive share of net income as reported on the partnership return filed, and no portion of her distributive share of net income from the partnership, as shown by the partnership return filed, is the net income of the taxpayer for purposes of federal income taxation.

In accordance with the foregoing, it is requested that it be found that there is no deficiency or over-assessment of tax for the calendar year 1944.

In the event you desire or require further information with respect to the foregoing, it is requested

that a hearing be arranged to be held at Portland, Oregon.

Please address a copy of all communications in this matter to my representative, Mr. Spencer R. Collins, 444 Miner Building, Eugene, Oregon.

Yours very truly,

/s/ LOUIS C. SCHARPF.

APPELLANTS' EXHIBIT No. 11

Twin Oaks Builders Supply Co.
Eugene, Oregon

March 6, 1948.

Collector of Internal Revenue
Portland, Oregon

Attention: Mr. R. P. Kueneke
In re: Louis C. Scharpf—1944

Dear Sir:

There is enclosed herewith a remittance in the amount of \$3,403.97 to cover the following items:

Notice and Demand dated February 26,
1948, addressed to Louis C. Scharpf—

1944 Additional IT	\$8,328.06	
Interest to 2-20-48	1,464.25	\$9,792.31

Overassessments of Eva M. Scharpf on
basis of notices of deficiency—

1943, Approximately	\$2,192.06	
1944, Approximately	4,196.28	6,388.34

Net Amount due remitted herewith.....	\$3,403.97
---------------------------------------	------------

There is enclosed herewith in duplicate a signed authorization to apply the overassessments computed or to be computed by the Commissioner as to Eva M. Scharpf to the account of Louis C. Scharpf.

The payment of the deficiency above described and the application of the credits as above set out are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

Yours very truly,

For LOUIS C. SCHARPF and
EVA M. SCHARPF.

SRC:bhs

Encls.

APPELLANTS' EXHIBIT No. 14

Form 843

Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp (Date received): [Blank]

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of Oregon,
County of Lane—ss.

Name of taxpayer or purchaser of stamps:

Eva M. Scharpf.

Business address:

669 High Street, Eugene, Oregon.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Oregon.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1944, to December 31, 1944.
3. Character of assessment or tax: Federal Income Tax.
4. Amount of assessment, \$4,196.28; dates of payment: Currently during 1944 and 1945 per return.

* * *

6. Amount to be refunded: \$4,196.28.

* * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on March 15, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

In a proceeding now pending before The Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that the income of this taxpayer for the year 1944 was the income of a corporation known as Twin Oaks Company, and also in notices of deficiency addressed to Louis C. Scharpf, taxpayer's spouse, under date of October 3, 1947, has determined that her income for the year 1944 is taxable to him. Should the Commissioner prevail in either of these positions this taxpayer will be entitled to a refund all or substantially all of the tax paid by her as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that no action be taken with respect thereto until final determinations shall have been had as to the taxation of the income of this taxpayer.

/s/

[In margin]: Original received Eugene, Ore.,
3-12-48.

U. S. Treasury Department
Internal Revenue Service
Securities Building
Seattle 1, Wash.

In Replying Refer to IT: Rev:LSB.

September 6, 1949.

Mrs. Eva M. Scharpf
669 High Street
Eugene, Oregon

In re: Claim for refund of \$4,196.28 for the
year 1944

Dear Mrs. Scharpf:

Reference is made to the claim referred to above,
filed by you for the refund of income taxes.

Inasmuch as an examination of this claim discloses that it raises issues which were allowed in the determination of the tax liability which formed the basis of the previous closing of your case, no further consideration will be given thereto.

Very truly yours,

/s/ S. R. STOCKTON,
Internal Revenue Agent
in Charge.

LSB:fee

APPELLANTS' EXHIBIT No. 16

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING STATMENT ON BEHALF
OF THE PETITIONER

By Mr. Davidson:

This involves the corporation income declared profits and declared excess profits asserted against the Twin Oaks Corporation for the year 1942.

The facts in the case are, briefly, these:

Prior to January 2, 1941, a corporation by the name of Twin Oaks Builders Supply Company was in the lumber and builders' supply business, with a principal place of business in Eugene, Oregon. The stock of that corporation was owned one-half by Mr. Rogers, and the other half by Mr. and Mrs. Scharpf, but out of that half owned by Mr. and Mrs. Scharpf, Mrs. Scharpf had acquired forty-six per cent and the remainder belonged to Mr. Scharpf, or four per cent. Now, Mr. Scharpf desired to have a greater interest in the business and insisted upon the company being dissolved, or, rather, upon the

formation of a partnership where he could have equal interest in the company, and Mrs. Scharpf was agreeable to that. So the corporation, after due consultation between the stockholders, was retained as a holding company, holding certain real property and office equipment. Accordingly, a new partnership was formed under the name of Twin Oaks Builders Supply Company, the name of the corporation being changed to Twin Oaks Company, its present name. That partnership purchased from the corporation the inventory and inventory values, which were cost or market, whichever was the lesser; also delivery equipment at book value, accounts receivable at face value, and took over the cash at face value.

The Court: Was it a partnership or a corporation which owned the assets?

Mr. Davidson: A corporation, your Honor. The partnership then entered into an agreement with the corporation for the rental of its property at \$250 a month, which was the value of the rental, a fair rental value; the business was thereafter conducted in the name of the partnership. The corporation continued as a holding company and collected rental upon its assets.

The Commissioner in this case has attacked the partnership, disallowing the status of both the wives as members of the partnership. A deficiency notice was filed, and the tax was paid, on that basis.

The Court: What year?

Mr. Davidson: For the years 1942, 1943 and 1944. The tax is really the income for 1944, but it

involves the income for those three years. Notwithstanding that, the Respondent has determined that all the income shall be taxed to the corporation for all purposes. The basis upon which the Respondent has made this claim is shown in the letter accompanying the deficiency notice, and the pertinent part of that letter reads as follows: "It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of Twin Oaks Builders' Supply Company, (2) your corporation purported to transfer certain of its properties to the alleged partnership and (3) your corporation purported to lease its real estate, buildings, furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for federal income tax purposes. Accordingly, the net income derived from the operation of the business conducted in the name of the Twin Oaks Builders' Supply Company for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years." It is our contention that these assets were purchased at fair market value, and that the properties of the corporation were leased at a fair rental value, and that no transactions have been conducted by the corporation so far as the sale of merchandise is concerned or any business, since that time; and upon that basis, the proper tax is to be on the members of the partnership.

OPENING STATEMENT ON BEHALF
OF THE RESPONDENT

By Mr. Pigg:

If the court please, I think counsel has given the court a fair picture of the background out of which the controversy arises, the issue being whether the income derived from the business carried on under the name of the purported partnership, the Twin Oaks Builders' Supply Company, for each of the years 1942, 1943 and 1944, is attributable to and should be included in the taxable income of this corporation, the Petitioner for those taxable years.

I would like to address myself next to counsel's observations insofar as they were directed to any determination or action of the Commissioner that is not directly involved in this proceeding, that is, to the determination or action as to which the partners, as such, were notified and by proper deficiency notice, that the partnership was not recognized for tax purposes insofar as their respective wives were purported to be partners, and proposing to tax the income attributable to the wives under the partnership arrangement to the husbands.

The court has no doubt already and no doubt it will be observed before the close of the proceeding, that this was an action taken by the Respondent for the purpose of protecting the revenue in the Government's interest. Insofar as those actions were inconsistent with the determinations as here made, the remedy of the parties involved, that is, the stockholders of this Petitioner corporation and the corre-

sponding partnership under the partnership arrangement, is by way of claim of refund if they have paid the tax.

Mr. Davidson has read to the court the paragraph of the deficiency notice, that is, the statement which accompanied the deficiency notice, which contains the essence of the Commissioner's determination in this case, and, consistent with that determination, it is the position and contention of the Respondent that his determination here should be sustained, because, as we believe will be shown by the evidence, this purported partnership was merely a tax-saving device, looking into business realities, whereby the Petitioner sat and seeks to channel its income not only to its stockholders, as such, but to the members of the immediate family.

Another principle upon which the Commissioner here relies is that, although the taxpayer may be allowed to choose whatever way he likes for the carrying on of his business, the Government is not required to acquiesce in the form so elected by the taxpayer, and it may require a look into the actualities, and if it is determined that the form that is so elected by the taxpayer is a sham or lacking in reality, or fiction, the Government may accept or disregard the fiction as best suits the purposes of the tax statute.

We believe it will be further shown that the arrangement which will be shown in this case are tantamount to an anticipatory arrangement, that is, an anticipatory assignment of income; and it is our contention that any anticipatory assignment of in-

come, through whatever form or whatever guise it may be accomplished, that does not absolve the Petitioner from tax liability, on the further ground that the economic realities, not the legal formalities, determine the tax competency, and that income is taxable to its creator or controller and not to its collector or beneficiary.

The determination in this case is not predicated upon Section 45 of the Internal Revenue Code, which relates to the election as between one taxable entity and another, and certain items of income and certain items of deduction in order to determine the true income. The determination here is that the alleged partnership is without substance and should be disregarded, and therefore there is no taxable entity for the purpose of recognition, or the application of the provisions of Section 45. However, I did not mean to undertake, if I could, to waive any provision of Section 45 or any other section of the Code. That I could not do if I attempted to. If it should appear, upon the conclusion of the evidence in this case, that Section 45 has any application, the Commissioner, of course, may rely on that section if it appears proper, and to the extent that it is proper; but it is certain that any such reliance would be in the alternative. I think that is all I have.

APPELLANTS' EXHIBIT No. 19

Law Offices of
Carl E. Davidson
1525 Yeon Building
Portland 4, Oregon

(Copy)

March 26, 1951.

Mr. S. R. Stockton
Internal Revenue Agent in Charge
Securities Building
Seattle 1, Washington

Re: Louis C. Scharpf,
669 High Street,
Eugene, Oregon,
Year 1944.

Dear Sir:

I acknowledge receipt of your letter of March 2, 1951, with which you enclosed a copy of the report of Revenue Agent C. H. Hardberger upon his examination of my income tax return for the year 1944, in connection with my claim for refund of \$7,131.44.

The examining revenue agent has recommended disallowance of my refund claim.

I protest the disallowance of the refund claim upon the facts stated in the said claim and the following additional facts: On or about January 25, 1941, I and my wife, Eva M. Scharpf, and John J. Rogers and his wife, Corabelle M. Rogers, entered

into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000.00 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.35, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000.00 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300.00 per year each. The losses of the said business were to be divided equally among the partners.

In entering into the said partnership, the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects and was entitled to recognition for federal income tax purposes.

The foregoing additional facts are set out in an amended refund claim for the year 1944 in the amount of \$4,138.78, filed by me with the Collector

of Internal Revenue, Portland, Oregon, on February 16, 1951.

The status of my wife, Eva M. Scharpf, as a partner in the business for the years 1942 and 1943 was the subject of a complaint filed by me in the District Court of the United States for the District of Oregon on November 30, 1950, the same being docketed therein as Civil No. 5832. On March 19, 1951, my attorneys were advised by Mr. Theron L. Caudle, Assistant Attorney General, that an administrative refund would be authorized and directed in the full amount sought by me in the refund suit.

A hearing is requested on the recommended disallowance of my refund claim, with the further request that my amended refund claim be considered at the same time.

Very truly yours,

/s/ LOUIS C. SCHARPF.

State of Oregon,
County of Lane—ss.

I, Louis C. Scharpf, being first duly sworn, upon my oath do say: That I am the taxpayer above named; that I have read the foregoing protest and am familiar with the facts stated therein, and that said facts are true as I verily believe.

/s/ LOUIS C. SCHARPF.

Subscribed and sworn to before me this 29th day of March, 1951.

[Seal] /s/ BETTY H. SCHANZE,
Notary Public for Oregon.

My Commission expires: 1/26/53.

I, Carl E. Davidson, hereby certify that I am one of the attorneys for Louis C. Scharpf, the taxpayer above named, and as such attorney prepared the foregoing protest; that I have no personal knowledge of the facts stated in said protest.

.....

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

Sept. 19—Filed complaint.

Sept. 19—Issued summons—to marshal.

Sept. 21—Filed summons.

Nov. 17—Filed answer.

1956

Jan. 12—Entered order setting for P.T.C. on Feb. 6 and for trial on Feb. 13, 1956.

Feb. 6—Entered order setting for P.T.C. on Feb. 13 and order striking from trial.

Feb. 13—Entered order that plaintiffs have 60 days to file brief—defendant 60 days to answer and plaintiffs 30 days to reply.

Feb. 13—Lodged pretrial order and one copy.

1956

Feb. 14—Filed and entered pretrial order.

June 8—Filed brief for defendant.

June 21—Filed plaintiffs' reply brief and submitted.

Oct. 29—Filed supplemental brief for defendant.

Dec. 14—Filed opinion.

1957

Apr. 4—Filed and entered findings of fact and conclusions of law.

Apr. 4—Filed and entered Judgment for defendant with costs.

May 31—Filed notice of appeal by plaintiffs.

May 31—Filed bond for costs on appeal.

June 6—Filed designation of contents of record on appeal.

June 6—Filed stipulation to forward exhibits to C. of A.

June 6—Filed and entered order on stipulation providing for forwarding of exhibits.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of Fact and Conclusions of Law;

Judgment; Notice of Appeal; Bond for Costs on Appeal; Order to Forward Exhibits to Court of Appeals; Designation of Contents of Record on Appeal, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8282, in which George L. Scharpf and William Fred Scharpf, Executors of the Estate of Louis C. Scharpf, are the Plaintiffs and Appellants and the United States of America is the Defendant and Appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Plaintiffs' exhibits 1 to 14, inc., 15-A to H; 16 to 23, inc., and Defendant's exhibits A and B.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 25th day of June, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15605. United States Court of Appeals for the Ninth Circuit. George L. Scharpf and William Fred Scharpf, Executors of the Estate of Louis C. Scharpf, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15605

GEORGE L. SCHARPF and WILLIAM FRED
SCHARPF, Executors of the Estate of Louis
C. Scharpf,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

The above-named appellants, George L. Scharpf and William Fred Scharpf, executors of the estate of Louis C. Scharpf, intend to rely on the following points on their appeal to the United States Court of Appeals for the Ninth Circuit:

1. The District Court erred in its Conclusion of Law No. 1, in concluding that "The claim for refund filed on March 13, 1948, by Louis C. Scharpf for the year 1944 was not a proper claim for refund inasmuch as it did not set forth the grounds or basis of this proceeding as required by Sections 322 and 3772 of the Internal Revenue Code of 1939."

2. The District Court erred in its Conclusion of Law No. 2, in concluding that "The claim for refund filed on February 16, 1951, by Louis C. Scharpf for the year 1954 was not a timely and

proper claim for refund as required by Sections 322 and 3772 of the Internal Revenue Code of 1939, nor was it a timely or proper amendment of his earlier claim for refund."

3. The District Court erred in its Conclusion of Law No. 3, in concluding that "The Commissioner of Internal Revenue waived none of his requirements in respect to the form or content of the claims for refund."

4. The District Court erred in its Conclusion of Law No. 4, in concluding that "The action of the Commissioner of Internal Revenue in disallowing the claims for refund was proper."

5. The original refund claim filed on March 13, 1948, by Louis C. Scharpf for the year 1944 (Appellants' Exhibit 12) was filed within two years of the date of payment (March 8, 1948) of the tax, the recovery of which is sought in this action. At that time the Commissioner of Internal Revenue was apprised of sufficient facts to ascertain the exact basis thereof.

6. In the alternative, appellants contend that the refund claim filed on February 16, 1951, by Louis C. Scharpf for the year 1944 (Appellants' Exhibit 13) was a proper and timely amendment of his earlier refund claim, as it was filed prior to the formal disallowance of said refund claim.

7. In the further alternative, appellants contend that the various exhibits introduced in the Tax Court trial of the case of *Twin Oaks Company v.*

Commissioner evidences the fact that the Commissioner of Internal Revenue was at all times aware of the exact basis of the refund claim filed by Louis C. Scharpf. The subsequently filed instruments and documents constituted amendments of and supplements to the original refund claim.

8. In the further alternative, appellants contend that the statements contained in the letter of March 6, 1948 (Appellants' Exhibit 11), constituted an informal refund claim.

9. In the final alternative, appellants contend that the actions of the Commissioner of Internal Revenue constituted a waiver of his regulations as to the required form of a refund claim.

10. The District Court erred in entering judgment for the appellee.

/s/ CHARLES P. DUFFY,
Of Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed June 26, 1957.